

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
JOHN D. CERQUEIRA,)	
)	
Plaintiff,)	
)	
v.)	
)	CIVIL ACTION NO.: 05-11652 WGY
AMERICAN AIRLINES, INC.,)	
)	
Defendant.)	
_____)	

**AMERICAN AIRLINES, INC.'S MOTION TO VACATE ENTRY OF JUDGMENT AND
RE-ENTER JUDGMENT IN FAVOR OF AMERICAN AIRLINES, INC.**

Defendant, American Airlines, Inc. ("American"), respectfully moves for an Order (1) vacating the Judgment in favor of American entered on January 16, 2008, which pre-dated the entry of the Certified Mandate of the United States Court of Appeals in this Court on March 17, 2008, and thereafter (2) re-entering Judgment in favor of American in accordance with the Certified Mandate. A copy of the Judgment is attached as Exhibit A; a copy of the Certified Mandate is attached as Exhibit B. As grounds therefore, American states that Judgment in this Court may enter only after the Certified Mandate is issued by the Court of Appeals and then entered by this Court.

DISCUSSION

I. STATEMENT OF CASE

Following a jury trial, Judgment entered in favor of the plaintiff, John D. Cerqueira, against American on January 16, 2007. On April 12, 2007, the Court allowed the plaintiff's Motion for Attorneys' Fees and Costs.

American successfully appealed the Judgment and the Court of Appeals entered Judgment on January 10, 2008, ordering the Judgment of the District Court to be reversed and remanding the case

to the District Court to (1) vacate the judgment and award of attorneys' fees for the plaintiff, and (2) enter judgment for American. A copy of the Judgment of the Court of Appeals is attached as Exhibit C. Thereafter, Judgment entered in this Court on January 16, 2008 (Exhibit A), ostensibly vacating the Judgment in favor of the plaintiff and entering Judgment in favor of American.

On January 24, 2008, the plaintiff filed with the Court of Appeals a Petition for Rehearing en banc. On February 29, 2008, the Court of Appeals issued an Order denying the Petition for Rehearing.¹ On March 14, 2008, the Court of Appeals issued its Certified Mandate. (Exhibit B).

II. THE JUDGMENT ENTERED ON JANUARY 16, 2008 IS A NULLITY AS THE CERTIFIED MANDATE OF THE COURT OF APPEALS HAD NOT ISSUED AND BEEN ENTERED IN THE DISTRICT COURT AS OF THE TIME THE JUDGMENT ENTERED.

In federal court a judgment does not become final following appeal until the case is returned to the district court and the mandate is spread. *Calderon v. U.S. District Court for Central District of California*, 128 F.3d 1283, 1286, n.2 citing 16A Wright, Miller & Cooper, *Federal Practice and Procedure* §3987, at 687 (2d ed. 1996) ("issuance of the appellate mandate returns the case to the district court"), *certiorari denied* 522 U.S. 1099, 118 S.Ct. 899, 139 L.Ed. 2d 884. The effect of the mandate is to bring the proceedings in a case on appeal in Court of Appeals to a close and to remove it from the jurisdiction of Court of Appeals, returning it to the forum whence it came. *Ostrer v. U.S.*, 584 F.2d 594, 598 (2nd Cir. 1978).

Consequently, the issuance of the mandate from the Court of Appeals on March 14, 2008 formally marked the end of appellate jurisdiction. Thereafter, "jurisdiction returned to the [District Court], for such proceedings as may be appropriate." *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 415 (C.A.D.C. 1986) (after mandate issued, District Court regained authority to enter judgments for appellees) citing *U.S. v. DiLapi*, 651 F.2d 140, 144

(2nd Cir.1981) *cert. denied* 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982).

On January 16, 2008, the date the Judgment (Exhibit A) was entered on the District Court's docket, the District Court did not have jurisdiction of the case. The District Court had no power or discretion to take action with respect to the matters that were then in the jurisdiction of the Court of Appeals. Under these circumstances, the Judgment (Exhibit A) was a nullity as the District Court had no jurisdiction to enter it at that time. *See Morris v. Unum Life Insurance Co. of America*, 430 F.3d 500, 502 (1st Cir.2005)(court was without power to entertain a further Rule 59 motion filed after ten-day deadline, therefore, motion was a nullity for Rule 59 purposes and the district court was without jurisdiction to grant it).

Vacating the Judgment will not prejudice the plaintiff as, currently, it is for all purposes ineffective.

II. JUDGMENT SHOULD ENTER IN FAVOR OF AMERICAN IN ACCORDANCE WITH THE CERTIFIED MANDATE OF THE COURT OF APPEALS.

After Judgment (Exhibit A) is vacated, Judgment should enter in favor of American in accordance with the Certified Mandate of the Court of Appeals. Entry of Judgment in accordance with the Certified Mandate is essential to give effect to the Court of Appeals' Judgment.

CONCLUSION

WHEREFORE, for the foregoing reasons, American respectfully requests the Court allow the instant motion and (1) vacate the Judgment entered on January, 16, 2008, and (2) enter Judgment in favor of American in accordance with the Certified Mandate of the Court of Appeals.

¹ The Court of Appeals also treated the Petition as a Petition for Rehearing before the original panel which was also denied.

Respectfully submitted,

AMERICAN AIRLINES, INC.

By Its Attorneys,

/s/ Michael A. Fitzhugh
Michael A. Fitzhugh (BBO #169700)
FITZHUGH & MARIANI LLP
155 Federal Street, Suite 1700
Boston, MA 02110-1727
(617) 695-2330

Dated: April 1, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on April 1, 2008.

/s/ Michael A. Fitzhugh
Michael A. Fitzhugh

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No: 05-11652-WGY

JOHN D. CERQUEIRA
Plaintiff

v.

AMERICAN AIRLINES
Defendant

JUDGMENT

Pursuant to the Judgment of the First Circuit Court of Appeals, the Judgment entered 1/16/07 and Attorneys fees awarded 4/12/07 are hereby Vacated and Judgment enters for the Defendant American Airlines.

Sarah Thornton
Clerk

/s/ Elizabeth Smith
Deputy Clerk

January 16, 2008
To: All Counsel

MANDATE

1:05-11652
USDCMA
Young

United States Court of Appeals For the First Circuit

No. 07-1824

JOHN D. CERQUEIRA,

Plaintiff, Appellee,

v.

AMERICAN AIRLINES, INC.,

Defendant, Appellant.

JUDGMENT

Entered: January 10, 2008

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is reversed, and the matter is remanded to the district court with instructions to vacate the judgment and fees award in favor of John D. Cerqueira and enter judgment for American Airlines, Inc.

Certified and Issued as Mandate
under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk

Richard Cushing Donovan
Deputy Clerk

Date: 3/14/08

By the Court:

Richard Cushing Donovan
Richard Cushing Donovan, Clerk

[Certified copies to Hon. William G. Young and Ms. Sarah Thornton, Clerk, United States District Court for the District of Massachusetts. Copies to Ms. Cantelo, Mr. Godkin, Mr. Kirkpatrick, Mr. Fitzhugh, Mr. Bramlett, Ms. Mariani, Ms. Skinner, Ms. Gerber, Mr. Powell, Mr. Schrader, Mr. Stavers, Mr. Foreman, Ms. Saxena, Ms. Birch, Mr. Eng, Ms. Baldillo, Ms. Valenzuela, Ms. Ciccolo, Mr. Asaka, & Mr. Maer.]

United States Court of Appeals For the First Circuit

No. 07-1824

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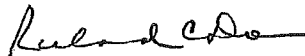
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By the Court: ,



Richard Cushing Donovan, Clerk

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